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IN THE

Supreme Court of the United States

OCTOBER TERM 1952-53.

No. 114

FEDERAL TRADE COMMISSION,

Petitioner,

v.

CARTER PRODUCTS, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

Introductory Statement.

This case involves neither conflict of authority between Circuit Courts nor any important precedent or question of procedure requiring review by this Court. It is simply an extreme and special case where the Commission through systematic and arbitrary foreclosure of all effective cross examination and by the grossly unfair tactics of its Trial Examiner was held to have denied the Respondent due process by depriving it of a fair and impartial trial.

No public interest nor any question of danger to the public is involved. The fact that the Commission permitted the proceedings to pend before it some eight years before any order was issued and that the Order itself expressly permitted the continued sale of the Respondent's product—which had been sold without complaint throughout this country for over 60 years—in itself eliminates any concern on that score. The Commission (R. 331) made an express finding negativing any claim of potential danger in the use of the product.

Notwithstanding this, the Order demolished at one stroke a vast property right of Respondent by excising the very word "liver" from the trade name of its product and prohibiting all claim that it influenced in any way the flow of bile.

In substance all that was involved in this proceeding was a claim of misleading advertising concerning highly doubt-ridden areas of therapeutics where medical opinion was divided.

A gigantic record (consisting originally of some eleven thousand pages of technical, medical and scientific expert testimony, dozens of elaborate and complex experiments and tests, over 2,200 statistical and technical exhibits) was produced in the course of a trial lasting over two years, at vast expense to the Respondent, which record facts the first reviewing court has already reviewed and re-reviewed. No claim is made that the lower court committed any error of law in finding prejudicial and reversible error or in concluding that there had been denial of due process and no showing is made to warrant this Court's assumption of the staggering burden of an independent review of this colossal and intricate mass of scientific data, facts and experiments.

The briefs alone presented by both parties to the Circuit Court in the course of its review and re-review aggregated over 300 printed pages.

The efficacy of Respondent's product and the truth of its claims were established by the testimony and evidence of 29 eminent physicians and scientists, including prominent endocrinologists, gastroenterologists, biochemists, etc., (Trial Examiner's Report, par. 169, p. 121), and by exhaustive scientific experiments and tests to which the Trial Examiner devotes 86 full pages of his Report (123-231), a discussion of which consumes several pages of the Commission's Findings (R. 321-326).

Nowhere in the Commission's Findings is there contained any criticism of the testimony, opinions or experiments of the Respondent's expert witnesses, the determination of the Commission being based solely on its claim that the evidence submitted by it formed the greater weight (R. 326).

It is a case where although every serious stricture made against its Trial Examiner's errors and misconduct of the trial was presented by Respondent to the Commission itself in elaborate briefs and exceptions and later found by the lower court to have constituted a total miscarriage of justice, the Commission never deigned to consider these well justified attacks on its hearing officer but treated them all with complete silence. If now the Commission finds its work undone, it has no one but itself to blame for not having heeded this timely warning.

Even now the Commission, though virtually conceding that the lower court was right in finding those errors prejudicial, has the temerity to suggest that the court below,—despite its finding of a positive denial of a fair and impartial trial on the part of the Commission—should nevertheless have remanded the case to that same agency to allow it to build upon that same contaminated record and thereby to perpetuate its wrong.

If there ever was a case where this Court should adhere to its "usual rule of non-interference where the conclusions of Circuit Courts depend on appreciation of circumstances which admit of differing interpretations" (*National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498 p. 502, *infra* Point One) and should deny the Petition pursuant to this Court's further fixed rules that it will not make an independent review of the Circuit Court's review but will and must rely on the judgment of the first reviewing court (*Radio Corp.* v. *U. S.*, 341 U. S. 412 p. 415, *infra* Point

Three), and in any event will not review discretionary matters involved in the granting or denial of a new trial, especially in the denial of a partial new trial (*Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, *U. S.* v. *Socony-Vacuum*, 310 U. S. 150, and *Schuerholz* v. *Roach*, 58 F. 2d 32, cert. den. 287 U. S. 623 *infra*, Point Four), the Respondent respectfully submits that this is it.

Unfortunately the Commission's persistence in discussing the so-called merits of this case and its constant references to the evidence, necessitate more extended discussion and a more lengthy Brief in opposition than would ordinarily be required on an application of this kind.

POINT ONE.

The Commission's concession that it does not urge as a ground for certiorari the lower court's holding that the rulings of the examiner restricting cross examination were erroneous and prejudicial leaves nothing for this Court to review.

A.

The Commission concedes at the outset for all practical purposes (Petition pp. 2 & 12) that the rulings of its Examiner which the court below found to constitute prejudicial errors, did in fact constitute just such errors. In a footnote at p. 13 of its Petition, the Commission flatly adds that it does "not urge as a ground for grant of certiorari, the holding of the court below that the rulings restricting cross-examination were erroneous and prejudicial."

B.

The court found not just one basic error, but at least a half dozen or more of such errors, and pronounced those errors both "flagrant" and "prejudicial".

The court found, amongst other things (Record Vol. V, Opinion, pp. 4-12), that (1) the rulings of the Examiner had in one important instance concerning one of the Commission's key experts prevented the Respondent from putting "the matter into proper perspective by inquiring whether and to what extent the witness's method conformed to standards employed by himself in other similar tests which he had performed." It found (2) that the ruling had even "cut off effective cross-examination as to whether the method conformed to accepted technical and scientific standards;" though it has been held specifically that a defendant has "the right not only to contradict the evidence of the government's expert, but also to show that the test and method pursued by him were not worthy of credit;" *Furlong* v. *U. S.*, 10 F. 2d 492, pp. 494-5.

It found (3) that other rulings of the Examiner had gone so far as to "have foreclosed inquiry into matters bearing materially on the validity of the experiments"—not just the weight, but the actual validity of experiments, and this in a case consisting very largely of this type of proof!

As to another vital set of experiments performed by another of the Commission's key experts, the court found (4) such convincing error in the tactics of the Examiner in foreclosing all attempts at effective cross-examination by Respondent that might have exposed the fact "that the experiments had little if any value as support for the conclusions drawn from them", that it was led to exclaim, "Little comment seems necessary." It found (5) that, "The condition imposed by the Examiner that petitioner make this adversary witness his own was flagrant error." (*Heard* v. *U. S.* 255 Fed. 829).

As to still another key expert, the court found (6) that the Examiner's arbitrary restrictions on cross-examination,

his parrying of "crucial questions" put to the witness concerning still other experiments had been accomplished by the Examiner's propounding of "a series of highly suggestive questions with the aim so to speak of cutting him (the witness) down to size." This biased and unjudicial action—the antithesis of impartiality—drew from the court the well merited denouncement "Now clearly it is not permissible for the Commission to qualify and use a witness for its own purposes as one having attainments in the field of gastroenterology, and then reduce him for purposes of cross-examination to the stature of a mere taker and explainer of X-rays. We think that was what was done in this instance."

As a further instance (7) of the bias and partiality of the Examiner in shielding the Commission's witnesses from justifiable attack, the court found as to this very witness, that (p. 12):

> "At a later stage of the proceedings petitioner subpenaed Dr. Case and offered to prove by him that he was president of the Battle Creek Food Company, producer and dispenser of a proprietary laxative in competition with petitioner, hence was an interested witness. The examiner rejected the offer on the ground that it came 'too late,' notwithstanding the case was still open for the taking of evidence."

In still another instance (8) involving basically important experiments concerning the grave issue of the translatability of tests on animals to human physiology, the Court refers to the Examiner as having "switched the ground of his adverse ruling."—action obviously inconsistent with impartiality.

Compliance with the legal prerequisite for evidentiary purposes of proof of similarity of conditions under which scientific experiments are performed (*N. Y. Life Ins. Co.* v.

Alman, 22 F. 2d 98, cert. den. 277 U. S. 586; *Navajo Freight Lines* v. *Mahaffy*, 174 F. 2d 305, p. 310) was, as the lower court's opinion shows, if not absent here, at least dubious in the extreme. As the court said, "these artificial and seemingly bizarre experiments" should properly have been subject to "scrutiny" necessitating a "broad range of exploration" (Opinion p. 6); again (Opinion p. 9) * * * "the abnormal condition of the experimentees plus the artificiality of the means by which the tests were carried on, suggested at least the possibility that the experiments had little if any value as support for the conclusions drawn from them."

This whole issue as to the transferability of experiments on animals to the functioning of man's liver, particularly under these artificial and dissimilar conditions, the validity of which the court found (Opinion p. 6) Respondent was foreclosed from testing, was basic to this whole case. It runs through the Trial Examiner's Report (109-10) and the Commission's Findings (R. 318-319). Yet the vulnerability of these experiments and of this thesis adverted to by the court in its opinion, finds further direct support in the admissions of this same witness of the Commission, Dr. Bollman, and also Dr. Ivy (R. 1382, 1383, 1441-2; 710) that there were certain important differences in the dog's liver and that in various respects experiments on these particular animals "could not be directly applied to man". All the more essential was it, therefore, as the court said, that Respondent should have been allowed by cross-examination to pursue and develop further important differences invalidating both the testimony and experiments of these witnesses.

The opinion presents the above specific prejudicial errors merely as so many typical "instances" "of undue" and "unjustifiable" restrictions of cross-examination, by

no means exhaustive, prefacing the analysis of their prejudicial effects with the general finding that (p. 4) "the rulings of the examiner tended to be insufferably technical where not wholly erroneous."

The materiality of each of these errors in the light of the complex scientific facts and background of this case, and their specific and concretely damaging effects in foreclosing all effective inquiry both as to the truth of the witnesses' own testimony and as to the validity of their experiments—which together comprise more than half of this 11,000 page record—were not only expressly found by the lower court and clearly demonstrated by it in the opinion itself but they are rendered unquestionable by the fact that the Commission's Findings (Record Vol. I, pp. 317-20) are squarely and almost exclusively based upon the testimony and experiments of these very witnesses.

The assessment of the materiality of each of these errors against the intricate factual, scientific background of this case, the weighing of their factual interrelationships and bearing on other scientific facts, issues and experiments and the determination of their precise factual importance were all predominately factual considerations necessarily involved in the lower court's careful and protracted consideration and appraisal of this complex record. In and of themselves all these matters presented questions of fact where this Court ordinarily applies the rule that certiorari is not "warranted merely to review the evidence or inferences drawn from it"; *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, p. 178, or for the purpose of considering "specific facts"; *U. S.* v. *Johnston*, 268 U. S. 220, p. 227; or where the Circuit Court has determined a question of fact and, as here, "this matter of fact is of no general importance"; *Federal Trade Commission* v. *Amer. Tobacco Co.*, 274 U. S. 543.

C.

It follows from principles peculiar to the law of cross-examination,—(without even considering at this point the lower court's further finding that the "cumulative effect" of these prejudicial errors resulted in a denial of due process)—that the concession of the Commission discussed above has the inevitable consequence of admitting that these prejudicial errors produced a precisely equivalent effect, namely, that they rendered the proceedings void, and left the lower court no other alternative than the one it selected of setting the Order aside.

D.

Despite their elementary character, and because of the importance of their application to this case, a review of those principles will help to illumine the present controversy.

1. Cross-examination is a fundamental right and not a privilege, (*Alford* v. *U. S.*, 282 U. S. 687, p. 691; *Reilly* v. *Pinkus*, 338 U. S. 269; *Gordon* v. *U. S.*, 344 U. S. 414). That right is secured to all as an element of due process and of "the essence of a fair trial" under the Constitution, equally as requisite in administrative as in other proceedings:

Alford v. *U. S. supra*, p. 692;

Ohio Bell Telephone Co. v. *Public Utilities Commission*, 301 U. S. 292;

Morgan v. *U. S.*, 304 U. S. 1;

Interstate Commerce Commission v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88;

Resurrection Gold Mining Co. v. *Fortune Gold Mining Co.*, 129 Fed. 668;

Powhatan Mining Co. v. *Ickes*, 118 F. 2d 105.

It was a right conferred in the instant proceeding by the express terms of the Federal Trade Commission's own Rules of Practice.

2. It is a right not just to some but to full cross-examination (*Alford* v. *U. S. supra; Powhatan Mining Co.* v. *Ickes*, 118 F. 2d 105; *Lindsey* v. *U. S.*, 133 F. 2d 368).

3. Especially wide latitude for cross-examination is held essential in the case of expert witnesses:

Coca-Cola v. *Moore*, 246 Fed. 942;

Victor American Fuel Co. v. *Tomljanovich*, 232 Fed. 662 (First Circuit), cert. den. 242 U. S. 643;

Yarn v. *Fort Dodge, D. M. & S. R. Co.*, 31 F. 2d 717, (Eighth Circuit), cert. den. 280 U. S. 568.

4. Though sometimes stated "that the control of cross-examination is within the discretion of the trial judge", "it is only after a party has had an opportunity substantially to exercise the right of cross-examination that discretion becomes operative"; "No one is required to make his adversary's witness his own * * *. He has the right to bind his adversary by the truth elicited from his own witness;" (*Lindsey* v. *U. S.*, *supra*, p. 369; *Gold Mining* case, *supra*; *Heard* v. *U. S.*, 255 Fed. 829, p. 833; *U. S.* v. *Michener*, 152 F. 2d 880; *J. E. Hanger, Inc.* v. *U. S.*, 160 F. 2d 8.

5. Where the right of cross-examination has been improperly curtailed as to material facts and issues in a case, reversible error is presumed; *Gilmer* v. *Higley*, 110 U. S. 47; *Alford* v. *U. S. supra; Gordon* v. *U. S.*, 344 U. S. 414; because, "the presumption is that the answer to a question propounded would have been favorable to the party who asked it, and that he would have followed the

inquiry thus opened farther". *Resurrection Gold Mining Co.* v. *Fortune Gold Mining Co.*, *supra*, p. 677; *Powhatan Mining Co.* v. *Ickes*, *supra*.

6. The effect of an unjustifiable abridgement of the fundamental right of cross-examination as to material facts and issues in a case, is to render the judgment void despite the existence of other ample evidence to support that judgment. This is so because the party whose rights have been thus abridged has been prevented from making any record capable of being reviewed; for (*Powhatan* case, *supra*, p. 110) "a reviewing court cannot know what a full hearing might have shown, and for that reason is not free to speculate as to the prejudice involved in such erroneous ruling," and also because a reviewing court is "unable to see how (the cross-examination) might have illuminated the controversy", or "how the" (hearing officer) "would have regarded the facts in evidence in the light of further facts which might have been elicited," (*Powhatan* case, *supra*, p. 109).

As this Court has said (*Alford* case, *supra*, p. 692) cross-examination is "necessarily exploratory;" "the rule that the examiner must indicate the purpose of his inquiry does not * * * apply"; because "it is the essence of a fair trial that reasonable latitude be given a cross-examiner even though he is unable to state to the court all the facts a reasonable cross-examination might develop"; because "prejudice ensues from a denial of the opportunity to place the witness in his proper setting, and put the weight of his testimony and his credibility to a test; because "to say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of

the safeguards essential to a fair trial." (*Alford* case, *supra*, p. 692.) See also

Gordon v. *U. S.*, 344 U. S. 414;
Powhatan Mining Co. v. *Ickes*, *supra*;
NLRB v. *Phelps*, 136 F. 2d 562;
Empire Oil & Gas Corp. v. *U. S.*, 136 F. 2d 868;
NLRB v. *Washington D. Food Co.*, 118 F. 2d 980;
Inland Steel Co. v. *NLRB*, 109 F. 2d 9.

As this Court recently held—in reversing a judgment for such errors in restricting cross examination—epitomizing their effect as relieving appellate courts from the obligation to search a record thereby rendered incomplete and presumptively defective—, "* * * no appellate court could rationally say whether the excluding of evidence unknown to the record was error, or, if so, was harmless"; *Gordon* v. *U. S. supra*, p. 420.

The Commission's constant discussion throughout this Petition of what the other evidence showed is thus beside the point. Actually—if space permitted—all its versions of the other evidence could be refuted and detailed record references could be given by Respondent to its own evidence, experiments and testimony disproving all these claims. It is a sufficient answer, however, that under these principles, had proper cross-examination and testing of both the testimony and experiments of the Commission's major witnesses been allowed, it would have been impossible to tell (a) how their testimony and experiments would themselves have been affected and changed, (b) how in turn the testimony and experiments of still other witnesses would thereby have been altered and (c) how in the light of all this the Commission would have regarded all the evidence thus adduced in this case.

Accordingly, everything—(a) abuse by the Examiner of discretion in unjustifiably foreclosing cross examination, (b) materiality of such fact and issue affected and (c) ensuing prejudice—is in effect conceded by the Commission, sufficient under the above principles to justify in all respects the action of the court below in setting aside these proceedings in their entirety.

No showing is made, nor for that matter even a suggestion, that the Court erred in the application of these legal principles, nor any showing that it overlooked any fact, circumstance or argument not already presented to it by the Commission or that were this Court now to undertake the herculean labor of re-reviewing this gigantic and complex record, it could possibly disagree with the lower court's findings of the materiality of each of these specific and complicated scientific facts and issues or differ with the first reviewing court as to their prejudice.

The lower court's fairness is demonstrated by the fact that it leaned over backward to hold against Respondent on a vital issue of grave prejudice, which with due deference to that court, Respondent believes constitutes still further justification for vacating the Commission's order.*

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*The lower court, evidently preferring to base its decision on these other impregnable grounds, apparently considered this Court's decision in *Kelly* v. *Phebus*, 336 U. S. 269 as strictly limited to instances involving proof of fraudulent intent, and also, in its opinion, referred to what it termed a "conflict of authority" generally as to the use of medical texts in cross-examination. But what was involved here was something quite different. The Commission's witness, Dr. Carlson, (R. 354-5; 357-8; 362-4; 366), and other witnesses of the Commission, Drs. Palmer, Ivy, Bollman (R. 488-9; 549; 1497), were permitted to tender *an issue of fact*, namely that their testimony represented the *consensus of medical opinion*, thereby adversely influencing the findings of both the Examiner and the Commission. This, *i. e.*, the consensus of medical opinion, was a *fact* (*U. S.* v. *Kaadt*, 171 F. 2d 600 pp. 603-4) which, like any

V.

The Commission ignores the position which this Court has announced, namely that, under the statutes which created this and similar administrative agencies, this Court is not called upon "to make an independent review of the review by the Court of Appeals", (*National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, p. 502), Congress having, as this Court there said, "charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement" of such agencies' orders.

The Commission disregards the position which this Court has taken (same case) that this Court will leave undisturbed by denying certiorari (pp. 502-3), decisions of Courts of Appeals involving a *fair* assessment and appraisal of the record, facts and circumstances. The Commission's position runs foul of the fact that in the *Pittsburgh S. S. Co.* case (p. 503) this Court expressed its adherence "to the usual rule of non-interference where conclusions of Circuit Courts depend on appreciation of circumstances which admit of differing interpretations", and that this Court has also since reaffirmed all those same views in *National Labor Relations Board* v. *American National Ins. Co.*, 343 U. S. 395, p. 410.

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other *fact*, Respondent was entitled to disprove by showing through cross-examination that contrary medical authority demonstrated that their opinions did not represent the consensus of medical opinion. As to this very different proposition, so-called conflicts in the general rules as to the use of medical texts in the cross-examination of experts as to their opinions—as distinguished from their statements concerning the *fact* of the *consensus* of medical opinion—were, Respondent respectfully submits, entirely irrelevant.

POINT TWO.

The lower court's further holding that the cumulative effect of all these admittedly prejudicial rulings was to deny to the respondent its constitutional right to a fair and impartial hearing and to result in a positive deprivation of due process made any other disposition of this case impossible and improper, and the disposition which the court made is in fact supported by the authorities cited by the Commission itself.

A.

The record facts compelled the lower court to take a further step which makes unique the contention of the Commission that the court erred in failing to remand the case to the Commission's tender mercies to build still further on this same erroneous record.

After finding that all these grave errors separately and in themselves were prejudicial, that they were "flagrant" errors, that these rulings were "arbitrary", that they affected vital rights of the Respondent, that they and others were "insufferably technical where not wholly erroneous", the lower court then proceeded to examine the record as a whole, and upon analysis, adjudged that their "cumulative effect" was to constitute a positive denial of due process, depriving Respondent of its constitutional right to a fair and impartial hearing. Here again this judicial process necessarily involved the assessment and appraisal by the lower court of a variety of complex scientific facts and issues and their interrelationships against the factual web and background of this case.

Again, the Commission concedes (Petition, pp. 17-18) that "there are situations in which the error is so pervasive in its nature that it infects the entire record," though

asserting categorically without so much as an attempt at supporting demonstration "That, plainly, is not this case" (p. 18).

B.

Under the Court's general finding of action on the Examiner's part "insufferably technical where not wholly erroneous", were additional factors which aggravated still further his violation of the essential elements of fair play. Not alone did the Examiner employ his erroneous applications of the rules of evidence so as to abridge the Respondent's fundamental right of cross-examination of the main witnesses of the Commission, he also at the same time continuously throughout the hearings employed a diametrically opposite and totally different set of rules and standards both for direct and cross-examination in favor of the Commission. By these tactics (instances of at least three of which specifically treated in the opinion itself have been mentioned), the injury to the Respondent's rights was naturally enhanced beyond measure.

In a record as long as this the lower court's opinion was necessarily selective, but the Briefs of the Respondent presented that court with a host of record instances, too numerous to mention here, where, while confining Respondent's cross-examination rigidly to the direct, or prohibiting Respondent from eliciting the witnesses' own opinions based on their experiments, or denying the production of underlying data on which their experiments were based, or permitting them to testify as to consensus of opinion, or limiting at his will the particular witnesses' qualifications in favor of the Commission, the Examiner, nevertheless, arbitrarily applied diametrically opposite and inconsistent rules against the Respondent when its turn came to examine the witnesses.

Of vital significance was it further that in this case one of the Commission's own key witnesses, Dr. Ivy, (whom its own witness Dr. Carlson recognized as a leading authority on the subject and whose work he endorsed, R. 356), had himself contributed to medical literature (R. 714-715) an article published in 1939, shortly prior to the commencement of these proceedings entitled "The Rationale of Bile Salt Therapy" in which he stated:

> "Since bile salts are laxative, a lack of bile salts would increase the tendency toward constipation and increasing constipation would further affect the liver and sphincter, thus probably setting up a vicious circle that is broken best by the administration of bile salts" (R. 715).

The Commission found here that Respondent's product, which was composed solely of aloes and podophyllum, had laxative properties (Findings, R. 312-313).

The Commission's Exhibit 97 (R. 563), an article written by the Commission's witness Dr. Ivy, flatly states (a) " * * * the literature on the effect of aloes and podophyllum on bile formation is contradictory" and (b) refers to "the uncertain state of the literature regarding the effect of aloes and podophyllum on bile formation."

The Examiner's Report expressly found that the liver is the only organ of the body "which cannot be explained by medical science at the present time" (Examiner's Report, 37 H) (33).

The complexity of the liver and the interrelationship between that organ of the body and all the systems in the body as a whole was established by the Commission's witness Dr. Carlson himself on re-direct examination when he said (R. 499) "the liver involves practically everything in the body in these internal fundamental processes."

Procedure by which the minimum requirement of at least equal opportunity to explore the facts is denied to one of the parties while over-generously accorded to the other, is, of course, shocking enough, but it is still more so where, as here, the whole inquiry related to scientific subjects where the spirit of the inquiry—like its subject matter—should have dictated the freest scope and the broadest and most clinical kind of approach in the interests of eliciting the truth. Still more is this the case where that inquiry was being conducted in a field not of exact science, but on the contrary of an inexact science—medicine and human physiology—and where the record shows that the inquiry bore on a particular domain in which medical history, literature, research and opinion were themselves divided and where the lower court found that the Respondent had been foreclosed even from testing the validity of the Commission's experiments.

C.

A judgment in a civil or a criminal case or in an administrative proceeding is without jurisdiction, void and illegal—where it is reached through denial of procedural due process, or of some essential element of it such as a fair and impartial hearing:

Int. Com. Com'n. v. *Louis. & Nash. R. R. Co.*, 227 U. S. 88 p. 91;

So. R. Co. v. *Virginia*, 290 U. S. 190, p. 199;

Ohio Bell Tel. Co. v. *Commission*, 301 U. S. 292;

Johnson v. *Zerbst*, 304 U. S. 458, p. 468;

Baker v. *Hudspeth*, 129 F. 2d 779, cert. den. 317 U. S. 681; re-hearing denied 317 U. S. 711;

Bass v. *Hoagland*, 172 F. 2d 205, applying the rule to both civil and criminal proceedings, cert. den. 338 U. S. 816;

Union Pac. R. Co. v. *Syas*, 246 Fed. 561, p. 568;

Rettig Beverage Co. v. *U. S.*, 13 F. 2d 740.

As this Court held (*Johnson* v. *Zerbst*, *supra*, p. 468), where such denial of due process occurs during the course of a trial, its effect is so grave as to cause the court to lose jurisdiction, "the court no longer has jurisdiction to proceed", and the judgment is void.

Accordingly there can be no such thing as a correct decision on the merits which a court can or will review where denial of due process has occurred.

Thus this Court in *Morgan* v. *U. S.*, 304 U. S. 1, (p. 22), holding that an administrative proceeding was invalid as the hearing having been unfair was "fatally defective" and a denial of due process, refused to review the case upon the merits, commenting, in words appropriate to the Commission's actions here, that agencies "created and endowed with such vast powers, * * * must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play."

In all such cases where due process has been denied, review is impossible, for as this Court said (*Ohio Bell Tel. Co.* v. *Comm'n*, 301 U. S. 292, p. 303), "To put the problem more concretely: how was it possible for the appellate court to review the law and the facts and intelligently decide that the findings of the Commission were supported by the evidence when the evidence that it approved was unknown and unknowable?"

Having found here a deprivation of due process, it would have been not alone an abuse of discretion for the lower court to have reviewed the merits (even if review were possible); it would have been to have condoned the Commission's denial of due process to this Respondent. Since no court may suffer a record created by such void proceedings to be reviewed upon the merits, *a fortiori* no court may suffer a record thus made to stand or be added

to. So finding, no other possible alternative was open to the lower court than to vacate the Order as a whole.

What then the Commission is really asking is for this Court to declare that there attaches to the Commission's acts as an administrative agency a special immunity from the nullifying effects of the denial of procedural due process not attaching to those of any court of law or equity in the land—an immunity so unique that no matter how great the Commission's denials of due process may be they can never be fatal nor beyond its power to rectify, upon remand to it of the case, by a little posthumous patching up of the old record.

D.

The Commission's Cases (Petition pp. 14-17) Distinguished or Shown Actually to Support the Lower Court's Judgment.

In none of them (and this disposes also of such cases as *Fresh Grown Preserve Corp.* v. *F. T. C.*, 125 F. 2d 917, 139 F. 2d 200; *Shaw* v. *Duncan*, 194 F. 2d 779, and *So. Stevedoring Co.* v. *Voris*, 190 F. 2d 275, cited Petition p. 15) did the reviewing court actually find that the cumulative effect of the many separate prejudicial errors of this particularly damaging type affecting a host of separate basic facts and issues constituted a complete denial of due process.

In *National Labor Relations Board* v. *Donnelly*, 330 U. S. 219 (Petition pp. 16-17) there was in fact an express finding by the lower court that the Board was not biased (p. 225) and in addition, this Court said (p. 225), "We do not find that in their combination these rulings amounted to unfairness"—a finding which, on the contrary, was expressly made by the first reviewing court here and not made by the lower court there. Implicit in this Court's whole opinion in the *Donnelly* case was the proposition that

the lower court had the power to, and could have directed a whole new proceeding, but that it had not done so. Further, the case carries on its face its own distinguishment, for not only did it not involve either of these fundamental elements—denial of due process and abridgement of the right of cross-examination—but the Commission's own quotation from the case shows that "there appeared only a very restricted dissatisfaction with the original proceeding before the Board, calling for a correspondingly restricted correction." In fact, this case supports the position of this Respondent and of the lower court, since its plain and inescapable implication is that where, as here, that dissatisfaction is complete—and is so found and re-found by the reviewing court—it calls for just such a correspondingly complete correction as was made in this case by the court below.

Equally unfortunate is the Commission's citation of *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364 (Petition, pp. 14 and 16-17), for there—although the Commission fails to cite the pertinent portions of this Court's opinion—what was actually involved was an entire new record and (305 U. S., pp. 372, 374) "a reconsideration of the entire case." There, the Board itself—unlike the Commission here—confessing the error of its ways, voluntarily sought a remand before any adverse decision had been rendered against it on appeal and (p. 366) "filed a motion (which was granted) for leave to withdraw its petition for enforcement."

The case is square authority that the Respondent here is entitled to a new hearing, freed entirely of the old record, for this Court there held (p. 375) that the "setting aside of the findings and the order carried with it the opportunity for reconsideration and the making of a new record." This Court spoke (p. 375) of the voluntary action

of the agency in that case in itself setting aside the order "as voluntarily doing what the Court could have compelled" and of the fact that thereby (p. 375) "In either event the findings and order are vacated. Petitioner's objection to the order because of lack of due hearing results in the abandonment of the findings and the order and petitioner will thus be completely freed from the determination they contain or any obligation they impose", clearly indicating that in no other way could the denial of due process be rectified than by setting aside both the findings and the order and requiring an entirely new hearing.

Reilly v. *Pinkus*, 338 U. S. 269 (Petition pp. 15 and 16) squarely supports Respondent's contentions in the court below as to the prejudicial error of the Examiner in refusing to permit the Commission's expert witness, Carlson, to be cross-examined as to diametrically contradictory opinions of other recognized medical authorities. It is the perfect illustration of the destructive effect of such arbitrary restrictions, for there reversible error was found by this Court even though—unlike the present case—the "conflict" in the evidence there was "slight" (p. 274); the product was conceded by the respondent there to be dangerous to the public and by one of its experts to be worthless (p. 272); there was no sharp cleft in medical literature or opinion nor contradictory admissions and writings by the Government's own expert witnesses, nor repeated and constant abridgements of the right of cross-examination of the basic expert witnesses as to a wealth of complicated scientific facts and issues in the case; and no question was there presented of the "cumulative" effect of many separate vital errors, nor finding made of "arbitrariness" nor of "flagrant" errors nor of "insufferably technical" or "wholly erroneous rulings". The issue there was single, simple, separate and unenmeshed in the record as a whole.

Finally, there was no finding there that systematic and arbitrary curtailment of fundamental rights had resulted in the denial of a fair and impartial trial. Had there been, this Court, in addition to holding as it did that the restriction constituted prejudicial and reversible error, would have had no choice but to have also declared the proceedings void in their entirety. Even as it was, this Court affirmed in the *Pinkus* case the action of both lower courts in granting summary judgment in favor of the plaintiff permanently enjoining enforcement of the administrative agency's order, and nothing whatsoever in this Court's opinion indicates that such proceedings as the agency might take were to be based upon the same old record.

Morgan v. *U. S.*, 304 U. S. 1; 313 U. S. 409 (Petition, p. 14) was a case where this Court held invalid an administrative order and reversed a judgment which had upheld it, because of the denial by the agency of a fair hearing. It emphatically was not a case where a remand was directed by this Court for further hearings by the administrative agency based on the same record under which the denial had occurred. Quite the contrary, there (313 U. S., pp. 415, 416) a new hearing was had upon new evidence but, by acquiescence of the individual parties, certain of the earlier findings were employed as a working basis on the new hearing. As this Court stated (313 U. S., p. 416) the individual parties "freely availed themselves of this procedure."

F. T. C. v. *Curtis Publishing Co.*, 260 U. S. 568 (Petition, p. 15) supports the Respondent. It is a case where for compelling reasons this Court found not merely that the proceedings should be set aside but where this Court itself on its own review of the evidence terminated those proceedings finally against the Commission holding that "the order to desist is clearly wrong and should be set aside without fur-

ther delay" (p. 582). Equally compelling reasons here impelled the court below to set aside the present order.

F. C. C. v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (Petition, p. 17) is the converse of the present case. There ironically enough, while the individual party urged recourse to the original record (p. 140) it was the administrative agency itself which sought and obtained from this Court vindication of its right to a new hearing on an entirely new record. Besides what this Court there condemned was the attempt under the special circumstances of that case of the Court of Appeals (p. 145) by its decree to "write the principle of priority into the statute."

In *F. P. C.* v. *Idaho Power Co.*, 344 U. S. 17 (Petition, p. 14), this Court merely held (p. 20) that where the court below "decided that the license should issue without the conditions, it usurped an administrative function." This was obvious because, as this Court said (p. 20) the Commission there had the right to elect whether it would issue any license at all and the lower court, in issuing one for it, was clearly intruding on an administrative function.

E.

The Weight of Authority Supports the Disposition Made by the Court Below.

The cases have been legion where this Court and other appellate federal courts have either terminated administrative proceedings finally without remand for errors of one type or other or have reversed and required entirely new hearings:

(1) *National Labor Relations Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, affirming an order of the Circuit Court which had the effect of finally terminating the administrative proceeding.

(2) *Northern Pacific* v. *Dept. Public Works*, 268 U. S. 39, p. 45 where this Court reversed and set aside in toto a decree affirming an administrative order because of arbitrary action and denial of due process.

(3) *McCart* v. *Indianapolis Water Co.*, 302 U. S. 419 ordering a hearing anew.

(4) *U. S.* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, in which this Court affirmed a decree perpetually enjoining the enforcement of an administrative order, saying (p. 290) "The matter improperly treated as evidence may have been an important factor in the conclusions reached by the Commission. The order must, therefore, be held void."

(5) In *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63 this Court held that where an administrative determination had been arbitrarily reached through a denial of due process the decree approving it must be set aside and an entire new hearing ordered, saying (p. 77) "Only in that way can review be full and fair."

(6) In *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, this Court held void and subject to collateral attack as a denial of procedural due process, administrative action taken without the hearing required by the Constitution and confirmed by the Federal Administrative Procedure Act, and reversed a judgment which had sustained such action.

(7) In *Bridges* v. *Wixon*, 326 U. S. 135 this Court set aside a judgment which sustained an administrative order based on the mere receipt of improper evidence, on grounds directly applicable here, namely that it was a case "where but for that evidence it is wholly speculative whether the requisite finding would have been made" (p. 156). This Court held there that denial of a fair hearing occurred because the administrative agency in that case—

as in this case by repudiating its own rules expressly permitting cross-examination—had likewise failed to observe its own rules of procedure, "designed as safeguards against essentially unfair procedures" (p. 155) and again reaffirmed the fixed principle that a party to an administrative proceeding is "entitled to insist upon the observance of" those rules (p. 153).

(8) In *Ulm* v. *Moore-McCormack Lines, Inc.*, 115 F. 2d 492, the Second Circuit Court set aside, on the authority of the *Alford* case, a judgment based upon undue restriction on the cross-examination of an expert medical witness and ordered a new trial. Just as in the present case, rehearing was subsequently requested on the ground that there should have been a partial retrial of a single issue. This the Second Circuit denied, 117 F. 2d 22, because it held the errors affected other issues. In so holding the court was following principles laid down by such decisions of this Court (cited by Respondent to the Court below in the present case on the Commission's petition for rehearing) as *Norfolk So. R. R. Co.* v. *Perebee*, 238 U. S. 269 p. 274, and *Gasoline Products Co.* v. *Champlin*, 283 U. S. 494 to the effect that a partial retrial "* * * may not properly be resorted to unless it clearly appears that the issue to be retried in so distinct and separable from the others that a trial of it alone may be had without injustice;" p. 500, *Gasoline Products* case. In the latter case this Court spoke of issues of fact as "so interwoven" as to make it impossible to isolate one from the other (p. 500).

This Court denied certiorari in the *Ulm* case (*supra*) in 313 U. S. 567.

(9) Where an administrative proceeding is unfair, as this Court held it to be in *Kessler* v. *Strecker*, 307 U. S. 22, p. 34 "* * * one of the elements mentioned is lacking, the proceeding is void and must be set aside," and a Circuit

Court's determination as to such unfairness will not be reversed by this Court.

The Commission's assertion (Petition p. 15) that the court below "did not hold or intimate that the examiner was biased or prejudiced" is, deprived of all force or meaning by its simultaneous concession that "the court below concluded that certain evidentiary rulings had the effect of making the hearing unfair to the respondent."

(10) Wherever partiality appears, wherever, it is found, as here, that there has been a denial of a fair and impartial hearing,—it has been the universal practice, without requiring a showing of personal bias or animosity, to set administrative proceeding aside in toto:

NLRB v. *Washington D. Food Co., supra;*
Inland Steel Co. v. *NLRB, supra;*
NLRB v. *Phelps, supra;*
Whitaker v. *McLean*, 118 F. 2d 596.

and "the fact that the * * * judgment may be justified on the merits does not obviate the requirement of a fair trial" (*Inland Steel Co. supra*) for "once partiality appears, and particularly when though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand," (*Phelps* case, *supra*); because "the injustice done by this kind of hearing can be remedied only by setting aside the order" and requiring "a new hearing" "upon the record to be made upon such new hearing"; (*Washington D. Food* and *Pouhatan Mining* cases, *supra*.).

F.

It is not the judgment of the lower court which has created any precedent necessitating review by this Court. It is the Commission which, by seeking certiorari on these grounds, asks this Court to create a precedent destructive of the law of constitutional due process.

POINT THREE.

The Commission's application should be denied because it seeks independent review by this Court not only of the Circuit Court's original review of this case but also of that court's re-review on the petition for rehearing at which all of the Commission's present contentions were carefully considered and rejected by the lower court.

A.

The Commission asks this Court not only to make an independent re-review of the original review of this case, on the original appeal, by the court below. The Commission is also asking this Court to make an independent re-review of the lower court's subsequent re-review of the entire case and of all the circumstances which impelled that court on reconsideration for a second time to adhere to its views that it was impracticable and impossible to remand this case for further hearings based on the old record.

Each and every one of the facts, circumstances and arguments now advanced by the Commission were advanced, considered and rejected after full and mature reconsideration on the petition for rehearing in the court below. The Commission's position in now seeking certiorari is therefore doubly violative of the principles enunciated by this Court in the *Pittsburgh S. S. Co. and American National Ins. Co.* cases, *supra*; of this Court's firmly established rule of non-interference with the conclusions of Circuit Courts in such cases, and of its equally fixed rule that in determining whether an administrative order should be upheld, "this Court must and does rely largely on a first reviewing court's conclusion;" *Radio Corp. v. U. S.*, 341 U. S. 412, p. 415.

It was shown to the lower court that one of the Commission's key witnesses, Dr. Lockwood, had died since the trial. The arbitrary cutting off of Respondent's right to cross examine this key witness and to show the invalidity of his experiments formed one of the main grounds, sustained by the lower court, of setting aside the Order. The effects of his testimony and experiments permeate the whole record and formed the basis for fundamental findings of the Commission (Findings, R. 317).

Before the necessary lengthy preparations could be completed for a rehearing, ten or more years would have elapsed since the giving by these witnesses of their original testimony. Properly to reorient these witnesses, to place them (as this Court said in the *Alford* case) in their "proper setting" and to re-saturate them in the atmosphere and background of this complex case, would be impossible. Many of the key witnesses on both sides would be unavailable. Some of them had already reached advanced ages and might be dead before the rehearings.

Apart from the well nigh impossible task, at this late date, of refreshing these witnesses' recollections after the lapse of twelve or more years, it would be necessary, on re-cross examination, to go over with them preliminarily and review and revise their entire original testimony both on direct and on cross examination. Law suits should be tried all at once not patched up from time to time like leaky buckets.

Apart again from this stupendous task, changes and revisions in medical opinion and research and experiments in medical science itself have also taken place affecting many of the major medical topics involved in this case. These would doubtless change the views formerly held by these key witnesses of the Commission.

Any number of additional fields of exploration and investigation would in fact develop. These in turn would require re-examining, not alone those three key witnesses, but still other witnesses of the Commission over and above these three and would necessitate even the calling of new witnesses. The process would be endless.

Each field of exploration was here dovetailed and interrelated with each other field and changes in the testimony or evidence, as a result of reversal of any particular witness, would inevitably require changes in the testimony of each other witness, and require an unending exploration and searching of the entire Record, which nothing but a hearing de novo would be adequate to provide.

To have remanded this complex and intricate litigation for limited rehearing before the same Trial Examiner whose rulings have been characterized by the lower court as inexplicably technical, as wholly erroneous and as flagrant error, and who would naturally be smarting under that just rebuke, would be unthinkably unfair to the Respondent. To appoint, on the other hand, a new Trial Examiner who has not observed the demeanor or had an opportunity to pass upon the credibility of the witnesses, and who would take this gigantic cold record without previous familiarity or education, would have been fantastic. A whole new recommended decision would have to be made; and besides, this procedure would have violated the rule of confrontation of witnesses laid down in *S. Buckeye Co. v. F. T. C.*, 133 F. 2d 85 and *Smith v. Dental Products Co.*, 168 F. 2d 516, as well as the express requirements of the Administrative Procedure Act (Title 5 U. S. C. Sect. 1004(c)) itself.

The court below was forced to conclude after a full review for the second time—as any other court including this Court itself would have been forced to conclude—that it was literally impossible even to frame intelligently an

order which would fairly or satisfactorily define the scope of a limited rehearing and that the only adequate means of merely protecting the Respondent's rights against the lingering after effects of all these prejudicial errors, of this denial of due process, was to set the Order aside entirely.

C.

These same observations apply to the belated contention of the Commission (Petition p. 20 etc.)—unsupported by demonstration—that certain provisions of the Order should still be sustained. The lower court had before it twice the entire Order. Finding that the cumulative effect of all these basic prejudicial errors was to amount to a denial of due process, the entire Order fell as a necessary consequence. Besides, it is simply impossible to disentangle one provision from another. The suggestions, for example, (Petition p. 20) that the provisions of the Order with respect to prohibiting Respondent's claims as to its product's effect on constipation and as to the safety of its product are laudable in view of the fact that the Commission's Order expressly permits the continued sale of the product as a laxative.

Indeed this was one field in which above all others it was inherently impossible to hold the Respondent's claims misleading. The Commission's main expert, Dr. Bellman, on cross-examination, even confessed to a total inability to define the very concept of "constipation", saying (1394) "Constipation—I cannot define constipation. * * * I am quite sure that if you were to ask fifty people you would get fifty different answers." Yet he was produced by the government as an expert in this field.

Besides, where provisions of an administrative order are invalid, other provisions which, as here, "would not have been made in their absence" will not be enforced;

R. I. DuPont De Nemours & Co. v. N. L. R. B., 116 F. 2d 388, p. 401; cert. den. 313 U. S. 571.

B.

The conclusion is inescapable that the Commission, on whom this Court has said "rests the burden of showing in what respects the judgment is erroneous" (*National Labor Relations Board v. Express Pub. Co.*, 312 U. S. 426, p. 432) has failed to make any case for review of the judgment below.

POINT FOUR.

The writ must be denied because the present application amounts to an attempt to obtain review of discretionary matters and determinations of questions of fact or at the minimum mixed questions of fact and law involved by analogy in the granting or denial of a new trial or of a partial new trial which are ordinarily not reviewable by this Court.

A.

The Commission is in effect merely disagreeing with the court below in the exercise of a discretionary power whose effect is analogous to the granting or denying of a whole new or of a partial new trial.

The determinations by the lower court as to the factual matters involved in the arbitrary limitations on cross-examination, the materiality of the facts whose exploration was precluded by those rulings, the relation of those facts to the other complex scientific facts and issues of this case and the holding that their "cumulative effect" was, under the facts of this case, to deny a fair hearing and that as a practical matter they were so factually related that partial

retrial on the old record was improper, were all largely determinations of fact or at the minimum mixed questions of fact and law.

B.

Therefore, by an analogy which the Commission itself invokes (Petition pp. 20-21), the present "case falls within the well-established rule that neither this Court nor the Circuit Court of Appeals will review" action "in granting or denying a motion for a new trial * * *";

U. S. v. *Socony-Vacuum Co.*, 310 U. S. 150, p. 247;
Fairmount Glass Works v. *Cub Fork Coal Co.*, 287 U. S. 474;
Newcomb v. *Wood*, 97 U. S. 581.

In such cases, this Court denies certiorari, more particularly where, as here, there is no showing of a clear abuse of discretion; *Viles* v. *Prudential Ins. Co.*, 107 F. 2d 696; cert. den. 308 U. S. 626; rehearing den. 309 U. S. 695, and where the matter of discretion has been passed on by the first reviewing court; *Stewart* v. *Capital Transit Co.*, 108 F. 2d 1; cert. den. 309 U. S. 657, rehearing den. 309 U. S. 696.

In fact this is especially the rule where the question involves discretion in denying an application for a partial retrial; *Schuerholz* v. *Roach*, 58 F. 2d 32 where the Circuit Court said p. 33 "But a motion to restrict the issues is addressed, in the first instance, to the sound discretion of the court, and a denial of the motion ought not lightly to be disturbed, for, while it involves the additional burden and expense of a repetition of the whole evidence, it gives to each party a full opportunity to present his side of the case. It may be noted in passing that no case has come to

our attention in which an appeal from a refusal to limit the issues upon a new trial has been successful." This Court denied certiorari, 267 U. S. 603.

No showing, nor even any contention, of abuse of discretion is made here by the Commission.

Indeed the whole theory upon which partial retrials where issues are clearly severable are ever granted is that, as to such severable issues, "a party has already had his day in court" (*Yates v. Dunn*, 11 F. R. D. 386, p. 392, cited Petition, p. 20), a situation the exact reverse of the present case where the lower court has found that Respondent did not have his day in court at all because the "cumulative effect" of all these prejudicial errors was to deprive him of his right to a fair and impartial trial.

Wherefore respondent respectfully requests that the application for a writ of certiorari be denied.

Respectfully submitted,

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